

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Rick Valentini,

Plaintiff,

v.

David Shinn, et al.,

Defendants.

No. CV-22-1612-PHX-MTL (DMF)

REPORT AND RECOMMENDATION

**TO THE HONORABLE MICHAEL T. LIBURDI, UNITED STATES DISTRICT
JUDGE:**

This matter is referred to the undersigned United States Magistrate Judge Deborah M. Fine pursuant to Rules 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized under 28 U.S.C. § 636(b)(1) (Doc. 21 at 21).

For the reasons set forth below, it is recommended that this matter be dismissed without prejudice for Plaintiff's failure to serve remaining Defendant Unknown Bomboy (also known as "James Bomboy" and referred to herein as "Defendant Bomboy").

I. BACKGROUND AND PROCEDURAL POSTURE

Throughout these proceedings, Plaintiff Rick Valentini ("Plaintiff") has been and remains confined in an Arizona State Prison Complex. In September 2022, Plaintiff filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. 1). On December 6, 2022, the Court dismissed the Complaint with leave to file a first amended complaint (Doc.

1 13). Later, Plaintiff's First Amended Complaint was dismissed with leave to file a second
2 amended complaint (Docs. 16, 18). Plaintiff thereafter filed his Second Amended
3 Complaint (Doc. 19).

4 On October 17, 2023, the Court dismissed without prejudice all counts except a
5 portion of Count Four and dismissed without prejudice all defendants except Defendant
6 Bomboy (Doc. 21). The Court concluded that "[l]iberally construed, Plaintiff has stated a
7 First Amendment retaliation claim against Defendant Bomboy in Count Four, and
8 Defendant Bomboy will thus be required to answer that portion of Count Four" (*Id.* at 18).

9 In the October 17, 2023, Order, the Court further directed that "Plaintiff must
10 complete and return the service packet to the Clerk of Court within 21 days of the date of
11 filing of this Order. The United States Marshal will not provide service of process if
12 Plaintiff fails to comply with this Order" (*Id.* at 19). Plaintiff was warned that if "Plaintiff
13 does not either obtain a waiver of service of the summons or complete service of the
14 Summons and Second Amended Complaint on Defendant within 90 days of the filing of
15 the Complaint or within 60 days of the filing of this Order, whichever is later, the action
16 may be dismissed. Fed. R. Civ. P. 4(m); LRCiv 16.2(b)(2)(B)(ii)" (*Id.* at 19-20). Plaintiff
17 was further warned that if he "fails to timely comply with every provision of this Order,
18 including these warnings, the Court may dismiss this action without further notice. *See*
19 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss
20 an action for failure to comply with any order of the Court)" (*Id.* at 19).

21 On November 17, 2023, the Court issued an Order to Show Cause for Plaintiff's
22 failure to timely return the completed service packet for Defendant Bomboy (Doc. 23).
23 The Order to Show Cause was returned as undeliverable (Doc. 25). Thereafter, Plaintiff
24 filed a motion for status (Doc. 27). On December 5, 2023, the Court granted the motion
25 for status and directed that the Clerk of Court provide another service packet for Defendant
26 Bomboy to Plaintiff (Doc. 28).

27 Plaintiff timely filled out and returned the service packet, which was forwarded to
28 the United States Marshal to attempt service of process on Defendant Bomboy. On

1 February 6, 2024, the service packet was returned unexecuted for Defendant Bomboy with
2 the following notation by the Deputy United States Marshal who attempted service:

3 Employer informed that Mr. John Bomboy who's real name is "James
4 Bomboy". Is no longer employed as a corrections officer and resigned on 14
5 December 2021.

6 (Doc. 31).

7 On February 8, 2024, the Court directed that the Arizona Attorney General's Office
8 provide "under seal, the last known address of Defendant James Bomboy or, alternatively,
9 a Notice indicating the Arizona Attorney General's Office or Arizona Department of
10 Corrections Rehabilitation and Reentry will accept service of process on his behalf" (Doc.
11 32). The Court further ordered that upon "receipt of Defendant Bomboy's last known
12 address, the Clerk of Court must prepare a service packet and forward it to the United States
13 Marshal Service for personal service" (*Id.* at 3). In the same Order, the Court nevertheless
14 reminded Plaintiff that it remained Plaintiff's responsibility for providing a valid service
15 address for Defendant Bomboy (*Id.* at 1-2).

16 On February 14, 2024, the Arizona Attorney General's Office ("AGO") provided a
17 Notice of Filing stating that neither the AGO nor Arizona Department of Corrections
18 Rehabilitation and Reentry ("ADCRR") would accept service for Defendant Bomboy; the
19 AGO submitted under seal ADCRR's last known address for Defendant Bomboy (Docs.
20 33, 34). Because the last known address is a United States post office box, the Court
21 ordered that the United States Marshal make efforts to seek a waiver of service from
22 Defendant Bomboy by first class mail to Defendant Bomboy at the United States post
23 office box provided by the AGO and ADCRR (Doc. 38). Plaintiff was again reminded that
24 it was Plaintiff's responsibility for providing a valid service address for Defendant Bomboy
25 (*Id.*). Plaintiff was warned that:

26 Defendant Bomboy may or may not waive service per the United States
27 Marshal mailing effort ordered herein. Thus, the Court will order that
28 Plaintiff must timely provide a service packet for Defendant Bomboy
containing an additional address for the United States Marshal to make

1 further efforts to attempt service, including an address for attempt of personal
2 service.

3 (*Id.* at 2).

4 The United States Marshal's attempt to obtain a waiver of service from Defendant
5 Bomboy was unsuccessful; as Plaintiff is long aware, in March 2024, Rhea Tate rather than
6 Defendant Bomboy signed the certified return receipt mailing for the waiver of service sent
7 to Defendant Bomboy at the post office address (Doc. 41; *see* Doc. 43 at 3). Defendant
8 Bomboy did not thereafter provide or file a waiver of service.

9 On April 17, 2024, the Court issued an Order to Show Cause for Plaintiff's failure
10 to comply with the Court's February 20, 2024, Order (Doc. 43). The Order to Show Cause
11 set forth Plaintiff's failure to provide a service packet for Defendant Bomboy containing
12 an additional address for the United States Marshal to make further efforts to attempt
13 service (*Id.*). The Order to Show Cause was also directed to Plaintiff's failure to timely
14 serve Defendant Bomboy (*Id.*). The Court ordered that within 21 days, Plaintiff must:

15 return the service packet as to Defendant Bomboy with additional
16 information for the United States Marshal to further attempt service or to
17 show cause in writing filed with the Court why this case should not be
18 dismissed for failure to timely serve Defendant Bomboy, failure to comply
19 with this Court's Orders, and failure to prosecute this matter.

20 (*Id.* at 3). After Plaintiff filed his response to the Court's Order to Show Cause stating that
21 he had not received any additional service packets, on May 28, 2024, the Court issued an
22 order directing that "the Clerk's Office to provide another service packet to Plaintiff for
23 Plaintiff to fill out and return to the Court within twenty-one (21) days with additional
24 service information for Defendant Bomboy" and warning that:

25 [i]f Plaintiff fails to timely return a new service packet with additional service
26 information for the United States Marshal to further attempt service of Defendant
27 Bomboy and/or not timely complete service of Defendant
28 Bomboy, then this matter may be dismissed without prejudice. The Court is
not inclined to extend the time for service again absent a motion for extension
of time containing a viable plan by Plaintiff for Plaintiff to obtain additional
service information for Defendant Bomboy.

1 (Doc. 46 at 2-3). The Order stated that:

2 Plaintiff is again put on notice that it is his responsibility and not the Court's
3 or the United States Marshal's Office to obtain accurate information for
4 service of Defendant Bomboy. Neither the Court nor the United States
5 Marshal may conduct investigation on Plaintiff's behalf (Docs. 32, 38). The
6 Court previously directed the Arizona Attorney General's Office and the
7 Arizona Department of Corrections Rehabilitation and Reentry ("ADCRR")
8 to provide a last known address of Defendant Bomboy upon learning that
9 Defendant Bomboy no longer works for ADCRR, and there was compliance
10 with the Court's Order (Docs. 32, 33, 34, 38, 41, 43). The United States
11 Marshal has made several attempts at service of Defendant Bomboy, all of
12 which have been unsuccessful (Docs. 31, 41, 43). These attempts have
included sending the waiver of service to the last known address of
Defendant Bomboy provided by ADCRR, which is a post office box. The
United States Marshal cannot reasonably attempt direct personal service of
Defendant Bomboy at the last known address provided by ADCRR, which is
a post office box.

13 (*Id.* at 2). Plaintiff was contemporaneously provided with another service packet for
14 Defendant Bomboy (Doc. 46-1 to 46-6), which Plaintiff has not returned.

15 Plaintiff filed a response to the Court's Order to Show Cause (Doc. 47). On June
16 17, 2024, the Court issued an order stating:

17 Plaintiff has now filed a response to the Court's Order regarding Plaintiff
18 returning a service packet for Defendant Bomboy (Docs. 46, 47). In the
19 response (Doc. 47), Plaintiff requests that the United States Marshal access
20 the post office box information card for the post office box provided for
21 Defendant James Bomboy, which was in Coolidge, AZ 85128 (*see* Docs. 32,
22 43). The post office box number in Coolidge, AZ 85128 was provided under
23 seal by counsel for ADCRR (*see* Docs. 32, 33, 34). The United States
24 Marshal does not have access to the post office's post office box information
25 card. Again, it is Plaintiff's responsibility to provide service information for
26 Defendant Bomboy for the United States Marshal to attempt service. The
Court will order that the Clerk of Court provide Plaintiff two subpoena duces
tecum packets for Plaintiff's use to attempt to obtain service information for
Defendant James Bomboy so that the United States Marshal can re-attempt
service in an additional (third) way on Defendant James Bomboy.

27 (Doc. 48 at 3). Plaintiff was contemporaneously provided "two unissued subpoena forms
28 and two USM-285 forms for subpoena service, both of which Plaintiff must fill out

1 completely and attach to any appropriate motion for issuance of subpoena in compliance
2 with General Order 18-19” (*Id.* at 4).

3 Plaintiff thereafter filed two requests for issuance of a subpoena, but the requests
4 did not comply with applicable legal requirements (Docs. 49, 50, 51, 52). On July 25,
5 2024, the Court granted Plaintiff’s third motion for a subpoena directed to obtaining service
6 information on Defendant Bomboy (Docs. 53, 54), and the Court extended the time for
7 completing service on Defendant Bomboy to September 22, 2024 (Doc. 54). On July 25,
8 2024, the issued subpoena with a documents return date of August 24, 2024, was forwarded
9 to the United States Marshal Service, and on July 29, 2024, service was returned as
10 executed on Postmaster Sheree Campbell on July 26, 2024 (Doc. 56). There have been no
11 filings in this matter after such time.

12 To date, Defendant Bomboy has not been served. To date, it appears that Plaintiff
13 has not taken any steps to obtain service information for or to otherwise serve Defendant
14 Bomboy other than as described above. Indeed, Plaintiff has not made any filing in this
15 matter after his July 23, 2024, request for a subpoena, which resulted in the subpoena being
16 promptly issued and served in July 2024 (Docs. 53, 54, 56). The return date for the
17 subpoena was in August 2024, which is now almost two months ago. Not only has
18 Defendant Bomboy not been served, but Plaintiff has not provided the Court with any
19 additional plan, let alone a viable plan, for service of Defendant Bomboy.

20 **II. DISCUSSION**

21 The issue before the Court is whether to grant Plaintiff an extension of time to serve
22 Defendant Bomboy pursuant to Fed. R. Civ. P. 4(m) or whether to dismiss unserved
23 Defendant Bomboy without prejudice for failure to timely serve. A federal court does not
24 have “personal jurisdiction over a defendant unless the defendant has been served in
25 accordance with Fed.R.Civ.P. 4.” *Travelers Cas. & Sur. Co. of America v. Brenneke*, 551
26 F.3d 1132, 1135 (9th Cir. 2009) (internal quotation marks and citations omitted). Rule
27 4(m) provides that:

28 [i]f a defendant is not served within 90 days after the complaint is filed, the

1 court—on motion or on its own after notice to the plaintiff—must dismiss
 2 the action without prejudice against that defendant or order that service must
 3 be made within a specified time. But if the plaintiff shows good cause for the
 4 failure, the court must extend the time for service for an appropriate period.
 5 This subdivision (m) does not apply to service in a foreign country under
 Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule
 71.1(d)(3)(A).

6 Fed. R. Civ. P. 4(m). A “plaintiff is responsible for having the summons and complaint
 7 served within the time allowed by Rule 4(m) and must furnish the necessary copies to the
 8 person who makes service.” Fed. R. Civ. P. 4(c)(1).

9 There are “two avenues for relief” from the time limit in Rule 4(m). *Lemoge v.*
 10 *United States*, 587 F.3d 1188, 1198 (9th Cir. 2009). The first, which is “mandatory,”
 11 requires a district court to “extend time for service upon a showing of good cause.” *Id.*
 12 (citing *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001)). Under the second, which is
 13 discretionary, “if good cause is not established, the district court may extend time for
 14 service upon a showing of excusable neglect.” *Id.* Although the Ninth Circuit has not
 15 “articulate[d] a specific test that a court must apply in exercising its discretion under Rule
 16 4(m),” *Sheehan*, 253 F.3d at 513, a Court may consider factors such as “a statute of
 17 limitations bar, prejudice to the defendant, actual notice of a lawsuit, and eventual service.”
 18 *Efaw v. Williams*, 473 F.3d 1038, 1041 (9th Cir. 2007) (internal quotations omitted).

19 **A. The Record Does Not Establish Good Cause for a Mandatory Extension of** 20 **Time**

21 For a mandatory extension of time, Plaintiff must show good cause. *Lemoge*, 587
 22 F.3d at 1198.

23 Good cause to avoid dismissal may be demonstrated by establishing, at
 24 minimum, excusable neglect. *See Boudette v. Barnette*, 923 F.2d 754, 756
 25 (9th Cir. 1991). In addition to excusable neglect, a plaintiff may be required
 26 to show the following factors to bring the excuse to the level of good cause:
 27 “(a) the party to be served personally received actual notice of the lawsuit;
 (b) the defendant would suffer no prejudice; and (c) plaintiff would be
 severely prejudiced if his complaint were dismissed.”

28 *Id.* at 1198 n. 3; *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) (holding a
 court's authority to dismiss for lack of prosecution is necessary to prevent undue delays in

1 the disposition of pending cases and to avoid congestion in the calendars of the district
2 courts); *Ferdik*, 963 F.2d at 1260 (holding that a district court may dismiss an action for
3 failure to comply with any order of the court). Here, Plaintiff has not shown excusable
4 neglect, and there is not good cause for an extension of time to effectuate service.

5 Nothing in the record suggests that Defendant Bomboy received actual notice of
6 Plaintiff's lawsuit. Defendant Bomboy has not been served with process, has not made an
7 appearance before the Court, and has not contacted the Court in any manner. Indeed, the
8 United States Marshal's attempt to complete service of Defendant Bomboy reflected that
9 Defendant Bomboy was no longer employed at the address Plaintiff provided or even as a
10 corrections officer. Accordingly, factor (a) does not support a finding of good cause.

11 As for factor (b), while the loss of "a quick victory" is not prejudicial, *Bateman v.*
12 *United States Postal Serv.*, 231 F.3d 1220, 1225 (9th Cir. 2000), the events at issue are
13 alleged by Plaintiff to have occurred in November 2021 (Doc. 19 at 10; Doc. 21 at 9-10
14 (Plaintiff "alleges that on November 9, 2021, Defendant Bomboy 'approached [Plaintiff's]
15 cell and physically threatened [Plaintiff] with bodily harm and threatened to destroy
16 [Plaintiff's] property if [Plaintiff] did not stop asking 'his' officers for inmate letters . . .
17 and informal complaint resolution [forms].'" (alterations in original)). The continued
18 passage of time is prejudicial to Defendant Bomboy given the difficulty in obtaining
19 evidence, such as witness testimony, as the alleged events become even older. Indeed,
20 Defendant Bomboy had no control over the timing of Plaintiff's lawsuit or Plaintiff's
21 repeated failures to state any claims against him before the Second Amended Complaint,
22 which was filed in 2023.

23 As for factor (c), "[a] dismissal for untimely service is required to be a dismissal
24 without prejudice[.]" thereby allowing a "plaintiff to refile the complaint and effect timely
25 service." *United States v. 2,164 Watches, More or Less, Bearing a Registered Trademark*
26 *of Guess?, Inc.*, 366 F.3d 767, 773 (9th Cir. 2004). If a plaintiff cannot refile a complaint
27 due to a statute of limitations, however, dismissal would severely prejudice a plaintiff. *See,*
28 *e.g., Trueman v. Johnson*, No. CIV 09-2179-PHX-RCB(DKD), 2011 WL 6721327, at *4

1 (D. Ariz. Dec. 21, 2011). Because “Section 1983 does not include its own statute of
2 limitations[,] . . . federal courts apply the statute of limitations governing personal injury
3 claims in the forum state.” *Finkle v. Ryan*, 174 F.Supp.3d 1174, 1186 (D. Ariz. 2016). In
4 Arizona, where Plaintiff alleges the events in his Complaint took place in part, the statute
5 of limitations “for personal injury claims is two years.” *Id.* Here, dismissal could, and
6 likely would, bar Plaintiff from refiling his Complaint. This factor weighs strongly in favor
7 of not dismissing the matter for failure to serve.

8 Nevertheless, Plaintiff has had approximately a year to serve Defendant Bomboy
9 and has exhausted all avenues Plaintiff pursued without successfully serving Defendant
10 Bomboy. The United States Marshal tried to serve Defendant Bomboy as Plaintiff
11 instructed at what Plaintiff believed was Defendant Bomboy’s place of employment as a
12 correctional officer. Given that Defendant Bomboy had ended employment as a
13 correctional officer between the alleged events and the United States Marshal’s attempt to
14 serve Defendant Bomboy per Plaintiff’s instructions, the Court ordered the AOG and
15 ADCRR to notify whether they would accept service for Defendant Bomboy; they will not
16 accept service for Defendant Bomboy. The Court ordered the last known address for
17 Defendant Bomboy be provided by AOG and ADCRR, which turned out to be a post office
18 box. The United States Marshal attempted to obtain Defendant Bomboy’s waiver of
19 service by mailing a waiver to the post office box, but the efforts were unsuccessful. A
20 subpoena to the post office’s postmaster was issued and served on Plaintiff’s request, but
21 Plaintiff still has not provided additional service information for Defendant Bomboy.
22 Importantly, Plaintiff has not provided the Court with any additional plans he has to
23 effectuate service of Defendant Bomboy. Given the efforts previously made towards
24 service and Plaintiff’s lack of any proposed additional plan for service of Defendant
25 Bomboy, the Court has no confidence that an extension of time would likely result in
26 service of Defendant Bomboy.

27 Accordingly, good cause for an extension of time to serve does not exist on the
28 record before the Court. Thus, an extension of time to serve is not mandatory.

1 **B. A Discretionary Extension of Time is Unwarranted**

2 Where good cause does not exist, the Court may grant a discretionary extension of
 3 time for Plaintiff to serve Defendants with the Complaint. The Court has “broad” but not
 4 limitless “discretion to extend time for service under Rule 4(m).” *Efaw*, 473 F.3d at 1041.
 5 In deciding whether to extend the time for service, “a district court may consider factors
 6 ‘like a statute of limitations bar, prejudice to the defendant, actual notice of a lawsuit, and
 7 eventual service.’” *Id.* (quoting *Troxell v. Fedders of N. Am., Inc.*, 160 F.3d 381, 383 (7th
 8 Cir. 1998)).

9 The Court has already granted numerous extensions of time to serve Defendant
 10 Bomboy in this matter. Also discussed above, the applicable factors do not warrant a
 11 discretionary additional extension to serve on this record.

12 **III. CONCLUSION**

13 On this record and for reasons set forth above, it is recommended that the Court
 14 dismiss the remaining claim (First Amendment retaliation in Count IV of the Second
 15 Amended Complaint) against Defendant Bomboy, and hence this action, without prejudice.

16 Accordingly,

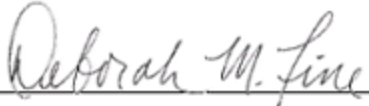
17 **IT IS RECOMMENDED** that the claim against Defendant Bomboy, and hence
 18 this action, be dismissed without prejudice and that the Clerk of Court be directed to
 19 terminate this matter.

20 This recommendation is not an order that is immediately appealable to the Ninth
 21 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal
 22 Rules of Appellate Procedure should not be filed until entry of the District Court’s
 23 judgment. The parties shall have fourteen days from the date of service of a copy of this
 24 recommendation within which to file specific written objections with the Court. *See* 28
 25 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6, 72. The parties shall have fourteen days within which
 26 to file responses to any objections. Failure to file timely objections to the Magistrate
 27 Judge’s Report and Recommendation may result in the acceptance of the Report and
 28 Recommendation by the District Court without further review. *See United States v. Reyna-*

1 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure to file timely objections to any factual
2 determination of the Magistrate Judge may be considered a waiver of a party's right to
3 appellate review of the findings of fact in an order or judgment entered pursuant to the
4 Magistrate Judge's recommendation. *See* Fed. R. Civ. P. 72.

5 In addition, LRCiv 7.2(e)(3) provides that "[u]nless otherwise permitted by the
6 Court, an objection to a Report and Recommendation issued by a Magistrate Judge shall
7 not exceed ten (10) pages."

8 Dated this 21st day of October, 2024.

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13 Honorable Deborah M. Fine
14 United States Magistrate Judge
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